

**Letter of Findings Number: 04-20110214**  
**Use Tax**  
**For the Years 2008-2009**

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**ISSUES**

**I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-3-4; IC § 6-8.1-5-1.

Taxpayer protests the Department's assessment of use tax on several items for which Taxpayer claims to have receipts demonstrating that sales tax was paid.

**II. Use Tax—Food.**

**Authority:** IC § 6-2.5-1-11.5; IC § 6-8.1-5-1; Sales Tax Information Bulletin 29 (August 2008).

Taxpayer protests the Department's assessment of use tax on an item it claims qualified for exemption as food.

**III. Use Tax—Manufacturing Exemption.**

**Authority:** IC § 6-2.5-5-3; [45 IAC 2.2-5-8](#).

Taxpayer protests the Department's assessment of use tax on welding tanks used to hold gases used in manufacturing.

**STATEMENT OF FACTS**

Taxpayer is a corporation doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that Taxpayer did not self-assess use tax on various items. The Department assessed use tax on these items. Taxpayer protested a portion of the assessment, the Department conducted an administrative hearing, and this Letter of Findings results. Additional facts will be supplied as necessary.

**I. Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the assessment of use tax on several items. The issue is whether Taxpayer paid Indiana sales tax on the items at the time the items were purchased.

Under IC § 6-8.1-5-1(c), the taxpayer has the burden of demonstrating that a proposed assessment is incorrect. Under IC § 6-2.5-3-4, use tax is not imposed on tangible personal property if Indiana sales or use tax had been previously imposed on the sale or use of that property.

In this case, Taxpayer has provided receipts for four items specified in Taxpayer's written protest. The receipts show that sales tax was paid at the point of purchase. Therefore, Taxpayer was not subject to use tax on these sales pursuant to IC § 6-2.5-3-4.

**FINDING**

Taxpayer's protest is sustained.

**II. Use Tax—Food.**

**DISCUSSION**

Taxpayer protests the assessment of use tax on a fruit basket. The issue was whether the fruit basket was food exempt from sales tax.

Under IC § 6-8.1-5-1(c), the taxpayer has the burden of demonstrating that a proposed assessment is incorrect. Taxpayer cites to Sales Tax Information Bulletin 29 (August 2008), 20080827 Ind. Reg. 045080658 NRA, for the proposition that, if the fruit basket contained fifty percent or more food (by selling price or purchase price), then the fruit basket is tax exempt. The bulletin comports with IC § 6-2.5-1-11.5(d)(3)(A)(i). However, Taxpayer has not provided information on the contents of the fruit basket to determine if the food items in the fruit basket constituted fifty percent or more of the price of the fruit basket. Therefore, Taxpayer has not met its burden of proof with regard to the fruit basket.

**FINDING**

Taxpayer's protest is respectfully denied.

**III. Use Tax—Manufacturing Exemption.**

**DISCUSSION**

Taxpayer protests the assessment of use tax on gas cylinders. The gases in question were used in manufacturing; however, the auditor determined that the cylinders were not used in manufacturing and assessed use tax on the rental of the cylinders.

Under IC § 6-2.5-5-3(b):

Except as provided in subsection (c) [relating to electrical distribution and transmission equipment purchased by a public electric utility], transactions involving manufacturing machinery, tools, and equipment are exempt

from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Department regulation [45 IAC 2.2-5-8\(c\)](#) provides that materials are directly used in the production process if "they have an immediate effect on the article being produced." Property has an immediate effect "if it is an essential and integral part of an integrated process which produces tangible personal property." However, [45 IAC 2.2-5-8\(g\)](#) provides also that:

The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required by law or by practical necessity does not itself mean that the property "has an immediate effect upon the article being produced."

For Taxpayer, the welding gas cylinders are necessary to contain the welding gases. Without the cylinders, Taxpayer's welding process could not occur. However, despite the fact that the cylinders are necessary and essential, the cylinders are not directly used in the direct production of tangible personal property, as required to qualify for sales and use tax exemption. Thus, Taxpayer's protest of the welding gas cylinders is denied.

#### **FINDING**

Taxpayer's protest is respectfully denied.

#### **SUMMARY**

Taxpayer's protest is sustained on the items listed in its protest for which it sought a credit for sales tax previously paid. Taxpayer's protest is otherwise denied. Any appropriate adjustments to the sample used for the assessment shall be made by the Department by means of a supplemental audit.

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